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THE MUNICIPAL COURT ACT—FOUNDED IN MISCONCEPTION OF FUNDAMENTAL PRINCIPLES OF PROCEDURE.

The National Corporation Reporter is not so optimistic as to the operation of the Municipal Court Act of Chicago, as it was in 1908, when its merriment was aroused at some comments of ours (67 C. L. J., p. 393), made in reference to that Act. Our response to the Reporter remains unanswered.

But the appellate court has given the Reporter an astonishing shock in the recent case of Hurford v. Josie, from which it appears that the construction of the Act in question is coming our way. This case seems to vindicate our prediction that the Act in question would be construed to conform to the necessities of fundamental law. In our article we referred to Mr. Hughes' definition of pleadings in his Section III, 1st Grounds and Rudiments. See, also, Sections 169, 273, Id.; also title Illinois, second Id.; also leading cases, 298, 299, third Id.

The case of Hurford v. Josie is not at hand. 139 Nat'l. Corp. Rep., p. 569, refers to that case and the observations allow us to conclude that the Municipal Court Act is faring badly from construction in the appellate court, as the Reporter views it. From what the Reporter informs us, we are not prepared to criticise the decision. Just now it looks as if the court was inclined to view the matter of the bill of exceptions, which Mr. Hughes calls the statutory record, as it most always has, and to continue to hold that all waivable matter will be viewed as abatement or dilatory matter; all agreeably to the dictates of *Interest reipublicae ut sit finis litium.* This maxim was cited with approval in Vallandingham v. Ryan, 17 Ill. 25; also in late cases.

Matter that the parties can waive is not, and never has been, treated with grace by able courts. It is the set policy of courts to give it the go-by and not extend to it liberal favor and thus delay cases in final disposition upon their merits, or, in other words, upon matters of substance. The matter of the statutory record is formal or waivable matter and courts will apply waiver to it, if possible. Section 103, 1 Hughes' Grounds and Rudiments: Presumptions are against the matter of the statutory record. This matter must in all cases be presented with precision and certainty; it must be attended with certificates that "this was all the evidence." Mallers v. Whittier Co., 170 Ill. 434. This argument is in accord with the presumption of regularity, which is in favor of a judgment after it is shown to be founded upon a record that will stand the test of a *coram judice* proceeding. Bro. Max., 949 (8th Ed.). After such a record is demonstrated, then every presumption is in favor of the judgment. It cannot be reversed upon the matter of the statutory record unless the latter record has been carefully preserved by the party offering it, at each step of the case, by objection, exception, motion for new trial, assignment of error and argument on appeal; this record has never been viewed with favor because of a policy issuing from *Interest reipublicae,* etc. This is a principle of the prescriptive constitution and neither written constitutions nor statutes can abolish it. It is a principle often ignored and denied, but there is more to vindicate it in every jurisdiction than to immolate it. Such maxims are landmarks set by antiquity for posterity and cannot be changed, much less removed. And so the appellate courts will decide in defining the operation of the Municipal Court Act of Chicago.

There is much in evidence to show that Illinois is in a perturbed condition judicially, as are also nearby and adjacent states, including Missouri. There are both pessimists and optimists in these states; all admit that the condition is bad and is becom-

ing intolerable. The former declare that the legal profession is submerged beyond redemption, while the latter, with whom we stand, insist that it can be uplifted. But the uplift will not come from legislative action, but from a right comprehension of fundamental principles. Literature that affords and elucidates these principles is what is needed. It is pitiable to see the destinies of a world's metropolis guided by supposed high authorities that do not understand organic law, and laboring under the belief that any real or permanent good can come from statutes except as they may be construed to facilitate—never to hinder—the enforcement of maxims whose existence from antiquity is proof that they are *the law*. Before any permanent good can come from attempted legal reform, the reformer must understand that the courts will not and cannot allow statute law to override the fundamental law expressed in the maxims and in accordance with which the operations of the human mind must, by their very nature, be carried on.

Illinois will do well to follow the example of Connecticut which adopted the English Judiciary Act. This Act gives the Supreme Court power to prescribe rules of court, or, in other words, to enact a Judicial Code for guidance to juridical ends. This would dispose of what the Reporter now informs us must next be done for the Chicago Act—take it back to the legislature for more patch-work and for further experiments. Instead of this, how much better would be ordinances of the Supreme Court regulating procedure in courts of justice.

Look at the great good that has come from Lord Bacon's ordinances governing the High Court of Chancery; and then look what the courts have been compelled to do to codes of procedure in American states. These codes have become veritable Babels in various states. We leave it to the Reporter to inform us what it is that has been given to Chicago in the Municipal Court Act.

NOTES OF IMPORTANT DECISIONS.

WATERS AND WATER COURSES—RIGHTS OF SURFACE OWNER IN UNDERGROUND STREAMS AND PERCOLATING WATERS FOR IRRIGATING PURPOSES.—The words "riparian owner" have been deemed at common law to refer to the rights which belong to the owner of land bordering on or inclosing a stream. The general right is crystalized in the maxim aqua debet currere ut currere solebat. But in the law of irrigation a riparian owner is not necessarily one whose land bounds a surface stream, but he may be the owner of land with a subterranean stream contributing its supply to a surface stream. Hudson v. Dailey (Cal.), 105 Pac. 748.

In a controversy between the owner of land through which a surface stream ran and defendants whose lands, some by underground streams and others by percolating waters, contributed to the surface stream, the former's prescriptive right in use was invoked against the latter.

The court held that lands abutting the stream and lands supplying it by underground streams were equally riparian and equally entitled to the use of the water which made the surface stream, the rights of each being limited to reasonable needs. As to prescriptive right in a stated quantity, the court, in speaking of water drawn to the surface from an underground stream, as flowing out of artesian wells, thus discourses: "Her (plaintiff's) use of the water, after it had passed through their lands and become part of the surface stream, would not injure them, nor constitute a trespass upon their property, and hence it would not be adverse to them and could not be the foundation of a title by prescription as against them." This same kind of reasoning could be advanced in favor of an upper riparian right in a surface stream, and herein statutory appropriation may have a better standing than a right arising out of prescriptive use.

The lands of defendants through which water percolated into the surface stream were held not to be riparian, but the same doctrine of reasonable use was applied to them.

Therefore, as to a mere prescriptive right subterranean streams and percolating waters are so far as the rights of a user from the surface stream are concerned on the like footing, but we imagine that as to statutory appropriation of water in the surface stream, they would be differently regarded.

As to percolating waters, it is said: "The owner of land has a natural right to the reasonable use of the water percolating therein, although it may be moving through his land

into the land of his neighbor, and although his use may prevent it from entering his neighbor's land or draw it therefrom. The right arises from the fact that the water is there in his land so that he may take it without trespassing upon his neighbor. His ownership of the land carries with it all the natural advantages of its situation and the right to a reasonable use of the land and everything it contains, limited only by the operation of the maxim, sic utere tuo ut alienum non leadas." But it is a new adaptation of this maxim to say that if I use my own my neighbor cannot use it. This is contrary to law, and it is not a correct one. The court, however, says, the maxim means I shall not waste my own, though the manner of the waste does not hurt my neighbor. I can only use it for my reasonable needs. This maxim did not contemplate the use of such property as depends for its existence on location rather than in essence.

The extension of the maxim, however, is interesting.

ABSTRACTS OF TITLE—LIABILITY OF SURETY ON BOND OF PUBLIC ABSTRACTER.—The laws of Oklahoma require of persons, firms and corporations in the business of abstracting titles the giving of a bond, respectively, in the sum of $5,000, conditioned upon damages for mutilation, etc., of records, and for damage "to any person or persons for whom he or they may compile, make or furnish abstracts of title to the amount of damage done to said person or persons by any incompleteness, imperfection or error made by said person, firm or corporation, in compiling said abstract."

In Walker v. Bowman, 105 Pac. 649, the Oklahoma Supreme Court held, that where a customer relying on an abstract furnished him by defendant abstracter sold property, under an abstract showing it was free of liens, and the purchaser, in order to protect same from a lien that the abstract should have shown, was compelled to pay a certain amount to displace said lien, and thereby the plaintiff customer "became liable to pay" said purchaser the amount he was compelled to pay, a demurrer to a petition setting up these facts was demurrable as stating no cause of action.

The theory of the court was that there was here stated a "mere apprehension" that the customer would be called upon to pay his purchaser.

We think the court held quite narrowly on this question, and that the cases it cited are by the ruling very greatly extended. Let us illustrate a moment. The property sold was incumbered by a lien. With it unforeclosed there would exist a "mere apprehension" of damage. With judgment of foreclosure thereon damage is actually suffered, because there is a fixed liability on the property, and substantial damage has been sustained. Still, however, it might be claimed that not yet has the seller, who is plaintiff, suffered actual damage. Let us see. The petition states the purchaser has paid off the lien, and thereby the seller has become liable to pay the purchaser. Is it not the suffering of substantial damage, for one to have become definitely liable, in contract? Suppose the seller had given to the purchaser his promissory note to pay, would not the damage have accrued? But how would he be more conclusively liable than he is. The note would simply displace the warranty clause.

The argument of the court seems in its final analysis to deny to the customer even the privilege of settling this liability without first suffering judgment and a showing that he was compelled to pay under legal duress.

We think it not good doctrine to say damage has not been suffered by a contingency the happening of which creates an indisputable liability arising ex contractu.

In our annotation in 69 Cent. L. J. 378-381, on abstracts of title, we cited authority to the effact that damage does ensue giving a purchaser prima facie right to sue, though he has neither exhausted his remedy against his warrantor nor averred his insolvency. Harrison v. Ward, 87 Pac. 171. See other cases also here cited.

It seems to us that this class of bonds being exacted by statute for the protection of the public, do not require the ordinary construction of strictissimi juris in favor of surety.

AUTOMOBILES VIEWED AS DANGEROUS MACHINES AND RULE OF NEGLIGENCE DEPENDENT THEREON. — The automobile decisions are about as variant and conflicting as any lover of "the glorious uncertainty of law" could desire. But the trend of cases seems getting more favorable. We quote from the recent case decided by the Wisconsin Supreme Court, of Steffen v. McNaughton, 124 N. W. 1016, embracing its supporting authority:

"When properly handled and used, automobiles are as readily and effectually regulated and controlled as other vehicles in common use, and, when so used, they are reasonably free from dangers. The dangers incident to their use as motor vehicles are commonly the result of the negligent and reckless conduct of those in charge of and operating them, and do not inhere in the construction and use of the vehicles. It is well known that they are being devoted to and used for the purposes

of traffic and as conveyances for the pleasure and convenience of all classes of persons and without menace to the safety of those using them or to others upon the same highway, when they are operated with reasonable care. The defendant cannot, therefore, be held liable upon the ground that the automobile is a dangerous contrivance. This view has been adopted by the courts in the following cases: Slater v. Advance Thresher Co., 97 Minn. 305, 107 N. W. 133; McIntyre v. Orner, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (N. S.) 1130, 117 Am. St. Rep. 359; Lewis v. Armours, 3 Ga. App. 50, 59 S. E. 338; Jones v. Hoge, 47 Wash. 663, 92 Pac. 433, 14 L. R. A (N S.) 216, 125 Am. St. Rep. 915; Cunningham v. Castle, 127 App. Div. 580, 111 N. Y. Supp. 1057."

We refer our readers to annotation in 69 Cent. L. J. 360, on Responsibility of Owner of Automobile as Dangerous Machine.

INSURANCE — INCONTESTABILITY CLAUSE IN POLICY.—It has been frequently held that a clause in a life insurance policy that it "shall be incontestable, except for non-payment of premiums, two years from date," is enforceable, and this holding has been lately followed by the Supreme Court of New Jersey in Drews v. Metropolitan L. Ins. Co., 75 Atl. 167.

The contention was advanced by the insurance company that, as the contract of insurance was obtained through fraud, the contract was void from the beginning, and, therefore, there was never any legal contract to which the agreed limitation could be applied.

The New Jersey court cites much authority for its conclusion that fraud is a defense, and the agreement was to impose a short statute of limitations for establishing it.

This seems something of a departure from the general rule that fraud vitiates all contracts, but the usual other rule applied is that of liberal construction in favor of the insured. It does not seem overharsh that an insurer should be held to obligate himself to look further into contracts for their invalidity or be considered to have waived them, instead of continuing to receive premiums and then begin to look for fraud when it is called on to pay. Certainly, if the company ascertained there was fraud and continued the insurance it ought to pay. If that be true, it could contract, for a consideration, that it should be taken to know there was fraud after a specified time, if any fraud in fact existed. Diligent search for fraud ought to ascertain its existence, or nonexistence, in two years' time. There is no condonation of fraud in this sort of construction, for search for it and taking advantage thereof has a distinct recognition, if the insurer wishes to avail himself of it.

The court refers, as along the same line as its conclusion, Wright v. M. B. L. Assn., 118 N. Y. 237, 6 L. R. A. 731; Reagan v. Union Mut. L. Ins. Co., 189 Mass. 555, 96 N. E. 217, 2 L. R. A. (N. S.) 1821; Royal Circle v. Achterath, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452, 98 Am. St. Rep. 224; Murray v. State Mut. L. Ins. Co., 22 R. I. 524, 48 Atl. 800, 53 L. R. A. 742.

STATE LAW—ANOTHER OPENING FOR INDEPENDENCE IN CONSTRUCTION BY FEDERAL COURTS. — Mr. Justice Lurton handed down his first opinions in the federal Supreme Court on February 21, 1910. In the first of these, as they stand in 30 Sup. Ct. Reporter, he points out an apparently new reason for this court not following state construction of state law—though it be statutory. Wright v. Georgia R. & B. Co., 30 Sup. Ct. 242.

In a suit for taxes by the state the extent of the exemption from taxation given in a railroad charter was being considered. The state claimed the qustion was res judicata, as shown by a former decision of the Georgia Supreme Court. The learned jurist first argues that while this former decision does construe the exemption as the state claims, yet the case going off "wholly upon the question as to whether the trial court had jurisdiction," the construction was obiter, then puts in an obiter himself, to which we especially call attention.

Supposing the Georgia decision not to be obiter, he remarks: "But in Georgia R. & Bkg. Co. v. Wright, 124 Ga. 596, the Supreme Court of Georgia seems to have definitely decided, that a judgment in a suit to collect a tax assessed for one year is not a bar to a suit for taxes subsequently assessed for another year, although the question decided in the first case is the same question upon which the second suit must be decided."

Then he observes that it is well settled that the federal Supreme Court accords to a judgment of a state only the effect which a court of the state gives to it, and, therefore, the prior decision, whether obiter or not, will not be regarded as controlling. That seems to us like grasping with something like desperation at a chance to disregard state ruling. Did the state court say, or mean to say, that what it had decided to be a vested right in an exemption statute was not a precedent just as much as its decision in regard to any other vested right? It only could have meant that a new levy of taxes is a new demand, and technically there being a new cause of action, or claim thereof,

res judicata could not be pleaded. It did not say it would not follow any principle settled by prior decision if it be shown applicable to the controversy before the court. Or if it did say that, Justice Lurton had need to set this out very clearly, and not as he has done. But even then he ought to have followed the latest expression of the Georgia Supreme Court and let the state's own court change its ruling, and not remit that duty to an outside tribunal. We have heard heretofore of the U. S. Supreme Court refusing to follow "oscillation in decision," and now comes another exception. Is it what Justice Holmes would call an arbitrary exception? Dissenting opinion in Kuhn v. Fairmont Coal Co., 30 Sup. Ct. 140.

LAWS FOR THE GUARANTY OF BANK DEPOSITS.

This subject is treated at some length in a recent number of the current volume of the Central Law Journal,[1] where laws of that character enacted in two states, Nebraska and Oklahoma, are mentioned. Both states undertook to restrict the right to engage in banking to corporations, and the writer of the paper just referred to, takes the position that such restriction is contrary to the Fourteenth Amendment to the Federal Constitution, which provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

That amendment does not interfere with the police power of the states.[2] Mr. Justice Field, in Bartemeyer v. Iowa,[3] said: "No one has ever pretended, that I am aware of, that the fourteenth amendment interferes in any respect with the police power of the state." That being the interpretation placed upon the amendment, when it is invoked against a legislative act of a state the question is not merely whether such act deprives a citizen of some right theretofore enjoyed, but whether it is within the legitimate exercise of the police power of the state. To determine this question there are two tests: First, Is the real object of the act a proper subject of legislative jurisdiction; Second, Are the means employed reasonably adapted to the end sought?[4]

Now as to the first test. It will be conceded that the business of banking is within the legitimate scope of legislative regulation. As was said in People v. Utica Ins. Co.:[5] "It may safely be admitted that formerly the right of banking was a common right belonging to the individuals, and to be exercised at their pleasure. It cannot, however, admit of doubt that the legislature had authority to regulate, modify or restrain this right."[6]

Now as to the second test. Are the means employed reasonably adapted to the attainment of the end sought? The end sought is the regulation of banking in such a way as to better serve the public welfare. When we take into account the intimate relation between banking and the commerce of the country; the fact that bank paper in the form of checks and drafts have, to a large extent, superceded money as a medium of exchange in the commercial world; the

(1) 70 C. L. J. 111.

(2) Slaughter House Cases, 16 Wall. 36.

(3) 18 Wall. 129.

(4) "The police power, though not capable of definition within exact limits, covers a very large residuary power to legislate on all matters concerning the public health, safety, morals and general welfare. This necessarily vests in the legislative branch of the government a large amount of discretionary power, but despite the strong presumption in favor of the validity of a particular exercise, the courts do not hesitate to condemn a statute as unconstitutional when the legislature has clearly overstepped the bounds of the police power, and has thereby violated the citizen's constitutional rights. In determining this question, the courts have adopted two tests which must both be satisfied in order that the statute may be upheld as a legislative exercise of the police power: First, is the real object of the act a proper object of legislative jurisdiction? Secondly, are the means employed reasonably adapted to the attainment of the end sought? If both of these tests are satisfied, none of the citizen's guaranties of liberty and property are violated, as it is universally agreed that the rights secured by such guaranties, are not absolute, but are held subject to this broad jurisdiction of the police power." Vol. X, No. 1, p. 56, Columbia Law Review.

(5) 15 John. 353.

(6) See also, Freund, Police Power, Secs. 400-401.

shock to business when payment of such paper is suspended, even for a short period; then it is easy to understand, that one of the problems before the legislative mind, in framing a banking system is, not only, so far as possible, to insure solvency, but permanency, and their being open at all reasonable times for the transaction of business.

Restricting the business is reasonably calculated to serve those ends. It insures a union of capital, energy and intelligence. It insures permanence. The bank of an individual, of necessity, closes at his death, and its depositors must await the tedious procedure of the probate court to adjust their accounts. A corporation, for all practical purposes, is immortal, and exempt from the accidents of disease and death.[7]

Does a bank guaranty law take property without due process of law, is the second question asked by the writer of the article mentioned in the opening sentence of this paper. He denounces such a law as paternalism. Government is inherently paternal. Protecting a citizen in the enjoyment of his rights, instead of leaving him to protect himself, is one of the first effects of government, and is paternalism pure and simple. From protection against force the protection against imposition is not a far cry. If the act were designed merely to protect individuals from the consequences of their own indiscretion or lack of judgment or foresight, it might very properly be called paternalism. But there are certain classes of business in which the individual cannot quite pick and choose. It is a matter of public interest that a business of that character be so conducted that the individual dealing with those engaged in it may do so in confidence that it is honestly and prudently managed. It is not sound public policy to compel a traveler, upon reaching a strange city, to bicker over hack fare, hence such fares are generally a matter of municipal regulation. An individual might apply the proper tests and protect himself against impure food, but the government paternally steps in and protects him. The transaction of business would be seriously handicapped, were negotiations to be suspended pending an examination of the bank upon which the paper in payment was drawn.

Business has so adjusted itself that it is no longer optional with the individual whether or no to deal with a bank. It might be a matter of small consequence to the public at large for one individual to lose his money through a bank failure, but in such case it is not one individual, nor a dozen who suffer, but the entire community. It is a matter of history that the legislation in question was inspired by the financial disturbance in 1907, when banking institutions throughout the country were compelled to suspend payment to their depositors. Those who will recall that period will agree with me that a suspension of payment to depositors is a public calamity. So thoroughly is this plowed into the public mind, that one who would institute a run on a bank, would be regarded as a public enemy. Hence, laws calculated to safeguard the rights of depositors in banks, are not paternal in the sense that they are designed to protect individuals against their own folly, but against their acts in matters where they were practically without choice, and to protect the public at large from the far-reaching consequences of a bank failure.

As before stated, a run on a bank is properly regarded as a public calamity. It destroys confidence and paralyzes business. Bentham, in his works,[8] says: "Police is, in general, a system of precaution, either for the prevention of crimes or calamities." The theory of banking is, that on any given day comparatively few depositors will draw out the whole or even a large part of the money standing to their credit. But in

(7) Such restriction was upheld in State ex rel. v. Woodmanse, 1 N. Dak. 246; Meyers v. Irwin, 2 Searg. & R. 367-372. The principle was upheld in Commonwealth v. Vrooman, 164 Pa. St. 306; Brady v. Mattern, 125 Iowa, 158; Nance v. Hemphill, 1 Ala. 551. State v. Scougal, 3 S. Dak. 55, appears to be the only authority against the proposition and in view of a peculiar constitutional provision of that state, it is entitled to little weight.

(8) Part 9, p. 157.

times of commercial disturbances and panic the banks are in danger of sudden demands by a large number of their customers for a return of their deposits. This is what is commonly known as a "run on the bank," and subjects the bank to a strain which few, if any, can withstand, and as a rule, forces a suspension of payment, even though the assets of the bank are ample, in the ordinary course of business, to protect the depositors.

It was to safeguard the public against such calamity that the laws under consideration were enacted. They may not do so in the most effective manner, but it cannot be said truthfully that they will not, to some degree at least, inspire the public with confidence in the safety of their deposits—at least add somewhat to their assurance that they will eventually be paid—and to that extent they are calculated to avert the public disaster of a "run on the bank."

The assessments levied against the banks to meet a case of insolvency are not a tax. They are more nearly analogous to the fund raised in some states from a license on dogs for payment to the owners of sheep killed by dogs. In those states it has never been held that such license operates to take the property of a citizen for a private use, and that the statute authorizing it is unconstitutional. There the keeper of a good dog, one that he has trained not to worry or kill sheep, is compelled to contribute to pay the damage done by untrained, sheep-killing mongrels. There the legislature recognized the fact that a man had a right to keep a dog; it was doubtless aware that the majority of dogs did not kill sheep; that there were good and bad dogs. It said, the law compels no man to keep a dog, but if you do keep one, you must contribute to a fund to repair the damages done by dogs not properly kept and managed. Here the law compels no man to keep a bank. But the legislatures have said by these laws, if you do keep one, you must contribute to a fund to meet the damages caused by those which are not properly kept and managed.[9]

(9) See Cole v. Hall, 103 Ill. 30; Van Horn v. People, 46 Mich. 183.

Besides, it does not follow that a business once open to all as a common-law right, may not be transformed by the demands of the public good into a franchise. When one devotes his property to a use in which the public has an interest, he in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the public good.[10] The business of banking includes, in its common-law signification the power to issue notes to circulate as money. The power to issue such notes, therefore, was at one time as freely exercisable by the individual as a common-law right, as that of receiving deposits, discounting paper, etc.[11] Yet from an early period in this country, to say nothing of England, the right to issue paper to circulate as money has generally been exercisable under a franchise.[12]

The historian, just cited, gives the following as the reasons for the transformation of that branch of the business of banking from a common-law right, to a right exercisable only under a grant from the sovereign: "The reasons of convenience which justify a prohibition of the liberty of issue are, first, that experience has shown that this process of borrowing money is too potent and too easily abused to the precipitation and aggravation of commercial crises." Might not a like reason justify a taking over of the common-law right to engage in other branches, and permitting its exercise only under a franchise from the state?

The guaranty feature of these laws is not an innovation. A similar feature was inserted in a banking law of New York in 1829, and in 1831 was included in a banking law of the state of Vermont. True, those acts were intended only to secure the circulation of the banks, but the principle involved was precisely the same, and al-

(10) Munn v. Illinois, 94 U. S. 113.

(11) See Mercantile Nat. Bank v. New York City, 121 U. S. 138-156; Exchange Bank v. Hines, 3 Ohio St. 1-31.

(12) See Attorney Gen. v. Utica Ins. Co., 2 Johns. Ch. 371; Ency'l Britannica, New Am. Sup., p. 327.

though they were before the courts of those states on more than one occasion, the able lawyers of those days never questioned their constitutionality.

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COMITY—PUBLIC POLICY.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, A corporation, v. McADAMS.

Supreme Court of Wisconsin.

The rule that the law of a place of a contract governs as to its validity and interpretation, applies to the capacity, including that of married women, to contract.

The general legislative policy of this state as to relieving married women from common law disabilities to contract, and other considerations, negative the idea that full right in that regard would involve anything inherently bad and warrant our courts in refusing to enforce the foreign contract of a married woman as accommodation maker of a promissory note on grounds of public policy.

MARSHALL, J.: The appeal raises for decision this proposition: Is a married woman's contract as accommodation maker of a promissory note, which is valid in the place where made, enforceable in the courts of this state, such a contract not being valid if made here? The proposition, in the main, is governed by a few quite elementary principles.

The first principle is this: As to mere personal contracts the law thereof as to their validity and interpretation, is that of the place where they were made; the lex loci contractus, unless the parties thereto intended that they should be governed by the law of the place of performance; the lex loci solutionis, or of some other place.

Another rule is this: The law of the place of performance regulates the matter in that regard, while matters respecting remedies depend upon the law of the forum. Brown v. Gates, 120 Wis. 349.

A third rule results, logically, from those mentioned, viz: A contract which is valid in the place thereof is valid everywhere.

A fourth rule is this: The law of one state having, ex proprio vigore, no validity in another state, the enforcement of a foreign contract which would not be valid by the law of the forum where its enforcement is judicially attempted, depends upon comity which is extended for that purpose, unless the agreement is contrary to the public policy of the state of the forum, in that it is contrary to good morals, or the state or its citizens would be injured by the enforcement, or it perniciously violates positive written or unwritten prohibitory law; the extent to which comity will be extended being very much a matter of judicial policy to be determined within reasonable limitations by each state for itself. Finney v. Guy, 106 Wis. 256, 276; Hunt v. Whewell, 122 Wis. 33, 42; Fox v. Postal Telegraph Cable Co., 138 Wis. 648.

A fourth rule is this: The doctrine that the law of the place of a contract governs as to its interpretation and validity, applies to the capacity of parties, including that of married women, to bind themselves in the manner attempted. Story on Conflict of Laws, sec. 103, sec. 241; Milliken v. Pratt, 125 Mass. 374.

The last rule that need be stated, is this: A contract under the foregoing is not, necessarily, contrary to the public policy of a state, merely because it could not validly have been made there, nor is it one to which comity will not be extended, merely because the making of such contracts in the place of the forum is prohibited, general statements to the contrary notwithstanding. In Milliken v. Pratt, supra, the court remarked substantially, even a contract expressly prohibited by the statutes of the state in which the suit is brought, if not in itself immoral (the term "immoral" being used in the broadest sense), is not necessarily, nor usually deemed so invalid that the comity of the state, as admitted by its court, will refuse to entertain an action under all circumstances to enforce it. There must be something inherently bad about it, something shocking to one's sense of what is right as measured by moral standards, in the judgment of the courts, something pernicious and injurious to the public welfare.

It will occur to one, on a moment's reflection, that the last foregoing rule could not be otherwise, else the doctrine that a contract valid at the place where made is valid and, generally speaking, enforceable everywhere, would be wholly nullified as to foreign contracts which would not be valid if made in the place of enforcement is sought. The rule would be useless, since in every case of such a contract it would never be enforceable except in the place where made.

Many illustrations might be given of instances of contracts made elsewhere, which would not have been valid if made here in the state where judicial enforcement was attempted, including instances where the invalidity was referrable to statutory prohibitions, being afforded by judicial remedies in the latter jurisdiction. Such are contracts providing for a rate of interest which would be usurious with penalizing consequences, even to the extent of forfeiture of principal and interest as to such a contract, if made in the law of the forum. Fisher v. Otis, 3 Pin. 78; Richards v. Globe Bank, 12 Wis. 692; Newman v. Kershaw, 10 Wis. 333; Vliet v. Camp, 13 Wis. 198; Lyon v. Ewing, 17 Wis. 61; Maynard v. Hall, 92 Wis. 565; Miller v. Tiffany, 1 Wall. 298, 310. Also, a contract allowable by the statute of frauds where made, held enforceable in another country where such a contract would be void by the written law. Scudder v. Union Nat. Bank, 91 U. S. 406. The same is true of Sunday contracts. Brown v. Gates, 120 Wis. 340; Hammon on Contracts, 260, and cases cited. The illustrations could be extended to many subjects, and contracts which would, if made here, not be enforceable because extinguished by the statute of limitation of our state.

From the foregoing it will be readily appreciated how a conflict between the judicial holdings of different countries might, as it has, create confusion respecting the proposition under consideration. There is opportunity for courts to be, as they seemingly have been in some instances, misled by looking only to the rule that a contract valid where made, which if made in the place of the forum would be contrary to law, and so not enforceable, is likewise remediless, not regarding that the rule is a mere exception, and quite a narrow one at that, to the broader rule covering contracts in general, but still greater opportunity for courts to take conflicting position by reason of each being, to a very large extent, supreme in its own jurisdiction as to what elements render a contract inherently harmful, and so to what extent, by rules of comity, the foreign law should be given effect.

The opportunities for conflict referred to have operated efficiently as to the proposition under discussion, as illustrated by cases holding that, in the circumstances here, the married woman's contract cannot be enforced (Armstrong v. Best, 112 N. C. 59; Thompson v. Taylor, 65 N. J. L. 107; Hayden v. Stone, 13 R. I. 106), while the great weight of authority is to the contrary upon the ground that such a contract is not against the policy of the law in the sense that the term is used in testing whether the foreign law of a contract as to its validity can be enforced. On this very many citations might be given. The following are but a very few of them: Milliken v. Pratt, 125 Mass. 374; Ross v. Ross, 129 Mass. 243, 246; Corrigue v. Keller, 164 Ind. 676; Baer Bros. v. Terry, 108 La. 597; Young v. Hart, 101 Va. 480; Baum v. Birchall, 150 Pa. St. 164; Gibson v. Sublett, 82 Ky. 596; Robinson v. Queen, 87 Tenn. 445; Bell v. Packard, 69 Me. 105.

The industry of counsel resulted in bringing to our attention three judicial authorities to support the negative of the proposition under consideration, which seems to be sufficiently in point to warrant noticing them. Counsel cite other cases, First Nat. Bank v. Shaw, 109 Tenn. 237; Rhue v. Buck, 124 Mo. 178; Dulin v. McCaw, 39 W. Va. 721; Bank of Louisiana v. Williams, 46 Miss. 618; Studebaker Bros. Co. v. Mau, 13 Wyo. 358, and the like. These cases either in principle support Milliken v. Pratt, supra, and the numerous cases we have cited, or go upon the ground that in the particular instance merely the manner of enforcement of the contract was involved, which is governed by the law of the forum, or the contract, though made in the foreign state, related to real property in the state of the forum; was not a mere personal contract enforceable in personam, but one enforceable in rem and by an action in the nature of one in rem.

The three cases cited by counsel to which we accord some significance, after careful research we are unable to add to, from other jurisdictions, though there may be some. Such few are entitled to very little weight.

Armstrong v. Best, 112 N. C. 59, went upon the obviously erroneous theory that, the law of the forum, as to the capacity of parties to contract, governs. That was stated without citation of authority, and it seems none of moment could have been cited. In a later case, Hanover Nat. Bank v. Howell, 118 N. C. 271, the court made an effort to place its doctrine on a more logical ground. After all the court seems to have doubted the soundness of its

position and rather invited legislative assistance for the purpose of avoiding it.

In Hayden v. Stone, 13 R. I. 106, the court approved the general principle that the validity of a contract is referrable to the law of the place where made, but leaned to the idea that it does not extend to the capacity to contract, and concluded in any event that the question in the particular instance really considered the remedy, and, as there was none afforded in that state to its own citizens to enforce a married woman's mere promissory note, none could be afforded to a citizen of another state. The infirmity of the logic, when tested by elementary principles, is apparent at once, except so far as it was competent for the Rhode Island court, in the absence of any restraint in the written law, to establish the doctrine announced as the public policy of that state, if it saw fit.

In Brown v. Browning, 15 R. I. 442, the court seems to have endeavored to very much limit its former decision, suggesting, in effect, that it did not go upon the validity of the contract, which was governed by the Massachusetts law where it was made, but to the particular remedy by attachment sought to be used.

Thompson v. Taylor, 65 N. J. L. 107, dealt with a married woman's agreement to be bound as an accommodation maker, as in this case, in face of an express prohibitory statute forbidding such agreements. The court recognized the general rule declared in the leading case of Milliken v. Pratt, supra, but concluded that the legislature having condemned such contracts as harmful, that established a public policy for the state precluding its courts from being used on grounds of comity to enforce such a contract, regardless of its being valid by the foreign law.

Nearly all the common law disabilities of women to contract have been removed. They can acquire and enjoy property and make all contracts necessary or convenient in that regard. They can, in equity, charge their property substantially at will. There is little left of a business nature which men can do that they cannot do. They have nearly all the rights of men, and some besides, and on all sides are making pressing claims with distinguished support for what is yet withheld, not very firmly nor perhaps very logically. How can the ordinary business contract in question, so common among men of ordinary perceptions, be said to be contrary to any policy of this state heretofore, or which should not be, adjudged bad in the interest of good morals? We can give no answer to that consistent with respondent's petition. It is considered there is none, and that the proposition under consideration must be answered in the affirmative. The decision appealed from is erroneous. The contract of respondent must be held as valid and enforceable here as in the place where it was made.

BY THE COURT: The judgment in respondent's favor is reversed, and the cause remanded, with directions to amend the judgment against the co-defendant so as to be against him and respondent as well.

NOTE.—*Disability of Coverture by the lex domicilii and the lex loci contractus with Reference to Comity.*—The principal case associates comity, as do many others, with this class of cases, and we instance several, as was done in an annotation in 51 Cent. L. J. 111, where the subject is elaborately treated.

In Young v. Hart, 101 Va. 480, 44 S. E. 703, the Virginia Court of Appeals says: "It seems to be well settled that a contract of a married woman, valid where made and to be performed, is valid everywhere, unless she be domiciled in a state where the law of the domicile imposes a total incapacity to contract on the part of its married women. Where the common law prevails in full force by which a married woman is deemed incapable of binding herself by any contract whatever, it has been held in some cases, and suggested in others, that this utter want of capacity must be considered as so fixed by the settled policy of the state that its courts could not yield to the law of another state in which she might underake to contract."

To this are cited Armstrong v. Best, and Milliken v. Pratt, *supra*.

The Milliken case is regarded as one of the leading cases on this subject. This case goes into considerable review of the authorities upon the question of capacity to contract being govered by the *lex domicilii* or the *lex loci contractus*. The opinion states that the principal reasons which determined continental jurists in favor of the former was the rightful power of the state to regulate the status and condition of its subjects, for being best acquainted with circumstances of climate, race, character, manners and customs, it can best judge at what age young persons may begin to act for themselves and whether and how far married women may act independently of their husbands. Against this the opinion speaks of comity allowing laws to operate extraterritorially and of its being, in the great majority of cases, especially in this country, where it is so common to travel or to transact business through agents, or to correspond by letter from one state to another, more just as well as more convenient, to have regard to the place of contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties may be presumed to have in contemplation when making their contracts, than to require them at their peril to know the domicile of those with whom they deal and to ascertain the law of that domicile, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all. The opinion considered the latter the more proper view, and as we take it, the *argumentum ob inconvenienti*, though

impliedly admitting that the state of domicile has the power claimed by the continental jurists to deny personal capacity to a particular class of subjects, should forcibly appeal to a comity jurisdiction in favor of another than the state of domicile, though this other abrogates the law of a domicile.

Then the opinion decides that the comity jurisdiction, if it has discarded the absolute incapacity theory, may enforce an extension in contractual capacity beyond what its own law provides for.

In the Armstrong case, which, as it appears to us, the principal case might have referred to somewhat more fully, the Milliken case is regarded as pushing the theory of *lex loci contractus* to the extreme limit, and yet admits that where the incapacity of a married woman is the settled policy of the state "for the protection of its own citizens, it could not be held by the courts of that state to yield to the law of another state in which she might undertake to contract." This case then goes on to show, that the policy of the forum is regarded more than the policy of the domicile—if incapacity exists at the forum that is the test. We purpose attempting to show that this application of policy at all is misplaced—possibly not by authority, but there is logic in the situation which the courts have overlooked. In North Carolina the *lex loci contractus* was refused enforcement because "the common law disability of a *feme covert* still obtains." The pushing to a limit in the Milliken case as viewed by the North Carolina court, appears to be in Massachusetts' statute awarding enforcement because the common law disability had been only partially abrogated.

In Frierson v. Williams, 57 Miss. 451, the opinion by Judge (afterwards Senator) George, whose reputation as a judge needs not to be told, it is said: "It is generally true that the capacity of a married woman to contract will be determined by the law of her domicile." This being taken as a basis, and it appearing that the laws of Louisiana and Mississippi were in accord that she is incapacitated from making a contract of suretyship, and that they differed with respect to her ability to charge her separate estate, Louisiana not permitting her to do this, and Mississippi allowing this, the *lex rei sitae* was applied. It was said: "There is no real conflict between the laws of Louisiana and Mississippi in reference to the contract. By both laws the note is void for what it purports to be on its face—a personal obligation of the wife; and it is void for the same reason in both, viz.: the personal incapacity of the wife. If the note had not been void by our laws, as the personal obligation of the wife, we should nevertheless, out of comity to a sister state, adjudge it void to that extent, if attempted to be enforced here; but the principle of comity does not require a state to regard the laws of any other state, so far as they may affect real estate situated in the former state." The note considered was executed at the domicile, and that being the place of contract, there was no reason to distinguish between the *lex domicilii* and *lex loci contractus* and therefore it might be urged this is not strong authority.

In Dulin v. McCaw, 39 W. Va. 721, 20 S. E. 681, the court speaks of the *lex loci contractus* governing in a married woman's case being strengthened by the fact that it was also the law of her domicile. This observation helps to lead on to what we will presently remark upon. Baum v. Birchall, 150 Pa. 164, is an authority going beyond the mere principle, that incapacity of domicile does not accompany her to the place of contract, if elsewhere, where the place of making is also the place of performance of, a contract, but a married woman can in her own domicile rid herself of incapacity by making performance elsewhere.

To our mind, there is no question of comity involved in these coverture matters at all, or in others where disability to contract is claimed. If the *lex domicilii* and the *lex loci contractus* concur to vest a right in one against another, that though a *chose in action* is a right in property and there is no question of a foreign law having extraterritorial operation. It has already operated intraterritorially by creating the right. If these two laws concur to pronounce a pretended claim of right absolutely invalid, how can one raise a void claim of right into a valid subsisting right by the locomotion of either party to a pretended transaction? Of course, there may arise a question in a comity jurisdiction that goes to the consideration being of an immoral or illegal nature, making its enforcement the lending of judicial remedies contrary to public policy. And the *lex rei sitae* may govern. But these two matters apply no more strongly to coverture disabilities than other contractual relations. If one, therefore, has in any competent place acquired a right by contract against a married woman, because she by the law of that place stands like a *feme sole*, she should be deemed a *feme sole everywhere*. If the law of that place says she is not a *feme sole* there, how can she be anywhere? No right of action there beginning, where else could it begin? Can a comity jurisdiction create a right?

But which law governs when there is divergence in respect to the ordinary place of contract? The Milliken case does not deny that it is valid legislation to impose disabilities upon the *subjects* of a state. And we think it may be said it can impose them on no one else. But if this is true, how can the *lex loci contractus* impose a disability unless it is also the *lex domicilii*? These cases on comity speak about the extraterritorial operation of laws, not being recognized, and then proceed to bind those not subjects of another state. Take the Baum-Birchall case and we perceive how one may procure a wife, remaining at her own domicile, to avoid her disability by signing a note and making it payable in another state.

But, it seems to us, that the Milliken case, relying as it does on nothing but confusion and inconvenience making necessary recognition of the *lex loci contractus* instead of *lex domicilii*, approaches very nearly to stating itself out of court, and we doubt whether by this course, confusion would be greatly allayed. Judge-made law rarely runs to assist harmonious administration, because one cannot put his finger on it with the same certainty that he does upon a statute. The federal courts in this kind of a question are too much tinctured with a federal virus to entitle them to be considered on the same plane with state cases. We get tired of hearing their judges talk about state duty and state policy, while they continue to claim independence in the interpretation of state law. C.

JETSAM AND FLOTSAM.

JUDGES LECTURING JURORS BECAUSE OF THEIR VERDICT.

We learn from an esteemed contemporary (New York Law Journal, Vol. XLII., page 2080), that a bill has been introduced in the New York Legislature as follows "Sec. 1793. Criticism of jury and jurors by presiding judges. The judge or justice presiding at the trial of a civil or criminal action in any court, shall not, in open court, make any adverse criticism of the jury or its members on account of the verdict in such action. Any judge or justice violating the provisions of this section is guilty of a misdemeanor." We have heard of some objurgations by judges that made them look like common scolds, and others which implied strongly corruption, and we greatly doubt whether we have thought there was any timeliness in either, if it might be conceded that the panel personally deserved what they got. It is one of the rarest things in the world, however, to find twelve competent men trying one case. They may be moved unconsciously to injustice, and may find a verdict from passion or prejudice, but to castigate from the bench a lot of free American citizens, in a respectable community, proves most generally that one who would do it is himself so intemperate and indomitable that an antidote ought to be considered as accompanying the scandal thus set afloat.

WESTERN FEDERAL JUDGES UNDER FIRE.

Last week we referred to the fact that for more than a year certain prominent federal judges have been under fire.

We stated then that we had not been nor were yet inclined to believe the charges in their entirety, but called upon the judges thus attacked to clear themselves and their high and important offices from the stigma cast upon them.

The most serious of these charges have been made against Judge Peter S. Grosscup of Chicago. We do not think best to repeat them. Nor do we know whether any of them would be proven or not. We are willing to give the judge the benefit of the doubt.

But we can no longer conceal the fact that many of the people, and not a few lawyers, have begun to express a lack of confidence in Judge Grosscup because of these charges.

The condition in Chicago is deplorable if newspaper reports are to be believed. There gross attacks have been made upon this particular judge in great public gatherings and in the press.

As we stated last week, wo do not care to peddle these charges, but are rather inclined to resent them in the manner they are made and call upon the judge's detractors to carry their evidence to Washington and substantiate them, or keep silent.

However, we cannot blind ourselves to the great loss of prestige that is resulting to the federal judiciary from these attacks, and in the interest of judicial integrity and confidence we must call upon Judge Grosscup, in the name of the profession, to silence the detractors and clear the fair name and honor of the great office he fills.

Judge Grosscup is a lawyer of considerable legal ability, and we greatly regret this serious attack upon him, but if he has been guilty of any indiscretions which have given any cause for such attacks, he should admit them and step down from his office in obedience to the demand of an outraged public opinion. If he has not been guilty of the charges against him, and we are quite ready to believe him to be guiltless, there is an open way for him to silence the charges forever.

Unless something is done to curb the growing popular antipathy to the federal judiciary, which is fanned into flames by such charges as are being made at the present time, the people will soon demand the abolishment of the life tenure of office for the lower federal judiciary. And we are beginning to believe it would be the part of wisdom for Congress to propose some such innovation at the earliest opportunity in the interest of justice and to revive public confidence in the nation's judiciary.

In the meantime we still believe it to be the duty of the bar to uphold the integrity of the bench whose occupants are being thus attacked, and to promote by all means possible the people's confidence in the courts.

BOOK REVIEWS.

MANUAL OF MEDICAL JURISPRUDENCE, 2d Ed.

Prof. Marshall D. Ewell, lecturer on medical jurisprudence at University of Michigan, presents a second edition of the above work, more than twenty years after the appearance of the first.

This is not a very large book, being octavo size and containing but 400 pages. But it has always been recognized as a meritorious publication, presenting in moderate compass leading facts and principles in the science of medicine, concisely stated and readily usable by a trial lawyer. There is little citation of legal authority to the text propositions, but condensation of such as is attempted is closely adhered to.

The author states that such changes have been made in the second edition as to make it "conform to the present state of the science."

The book is in cloth with net price of $2.50, and published by Little, Brown & Co., Boston, 1909.

FREE PRESS ANTHOLOGY.

This volume contains some excellent matter, especially what it compiled about Free Press. Other things the author includes in regard to "Censorship of Obscenity," "Free Sex Discussion," "Liberty of Speech for Anarchists," would have improved his performance in producing a book by their absence. People write prurient things because they are approved by the prurient minded. Conversation designed to elevate thought is like a painting suggestive of purity. A ribald license in the exposure by tongue or pen of what suggests impure reflections is like portrayal by statuary or painting of indecency. All present a picture to the mind. Purity needs not to be offended by impurity. If books or billboards abound which flaunt impurity, they come under police power as much as nauseous odors, in their detraction from public health and comfort. A moral stench is as unhealthful to the body politic as a physical stench.

Nevertheless the contribution selected from the writings of Milton, Locke, John Stuart Mill, Bentham and other such, who, we believe, would as earnestly as other pure-minded people, deride the claim that obscenity and anarchy in speech, should claim protection in a free speech, are a most excellent collection. This book seems to us to prove there are extremists among the so-called liberals, as well as those in censorship, but the common sense of the world knows that anarchists ought not to be allowed to foment the overturning of government while enjoying its protection, and that assaults on purity are, in their final analysis, assaults on government.

This book is in paper cover, showing compilation by Theodore Schroeder, and published by The Free Speech League, 120 Lexington avenue, and The Truth Seeker Pub. Co., 62 Vesey street, both of New York City, 1909.

BOOKS RECEIVED.

Law Classics Library. Six volumes. Vol. I., Grotius—The Rights of War and Peace. Vol. II. Plato—The Republic. The Statesman. Vol. III, Sir George Cornewall Lewis—The Government of Dependencies. Adam Smith—An Essay on Colonies. Vols. IV and V, Hamilton, Jay, Madison—The Federalist. Walter Bagehot—The English Constitution. Vol. VI, Sir Thomas More, Lord Bacon, Campanella, Rousseau—Ideal Empires and Republics. Price $30.00 per set. Central Law Journal Company, Selling Agents. Review will follow.

The American State Reports, containing the cases of general value and authority subsequent to those contained in the "American Decisions," and the "American Reports," decided in the Courts of Last Resort of the several states. Selected, reported and annotated by A. C. Freeman, Vol. 129, San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers, 1910. Review will follow.

Theory and Practice of Estate Accounting. For accountants, lawyers, executors, administrators and trustees. By Frederick H. Baugh, expert accountant, and William C. Schmeisser, A. B., LL. D., of the Baltimore bar. Baltimore: M. Curlander, Law Bookseller and Importer, 1910. Price $4.00. Review will follow.

HUMOR OF THE LAW.

"If I can free this case from technicalities and get it properly swung to the jury, I'll win," Abraham Lincoln used to say, when confident of the justice of the cause he represented. He was weak in defending a wrong case, for he was mentally and morally too honest to explain away the bad point of a cause by ingenious sophistry.

Instead of attempting to bolster up such a cause, he abandoned it. Once he abandoned a case in open court, being convinced that it was unjust. A less fastidious lawyer took Mr. Lincoln's place and won the case.

Mr. Herndon, in his "Life of Lincoln," tells a story which exhibits his ability in getting a case he believed in "properly swung to the jury."

A pension agent, named Wright, secured for the widow of a Revolutionary soldier a pension of four hundred dollars of which sum he retained one-half as his fee. The pensioner, a crippled old woman, hobbled into Lincoln's office and told her story. It stirred Lincoln up; he brought suit against the agent, and on the day of the trial he said:

"I am going to skin Wright and get that money back."

He did so. The old woman told her story to the jury. Lincoln, in his plea, drew a picture of the hardships of Valley Forge, describing the soldiers as creeping barefooted over the ice, and marking their tracks by their bleeding feet. Then he contrasted the hardships of the soldiers endured for their country with the hardened action of the agent in fleecing the old woman of one-half of her pension.

He was merciless; the members of the jury were in tears, and the agent writhed in his seat under the castigation of Lincoln's denunciation. The jury returned a verdict in her favor for the full amount, and Lincoln made no charge for her services.

His notes for the argument were unique:

"No contract.—Not professional services.—Unreasonable charge.—Money retained by Def't not given by Pl'ff.—Revolutionary War.—Describe Valley Forge privations.—Ice.—Soldiers' bleeding feet.—Pl'ff's husband.—Soldier leaving for army.—Skin Def't.—Close."

In these days, when trial by newspaper is fast taking the place of trial by jury, it is encouraging to meet with any evidence that the editorial mind takes a large and judicial view of social questions. Here, for instance, is a Missouri journal which lays down a broad principle, the equity of which few will be found to dispute:

"If you are a married man," this editor declares, "your wife can compel you to support her. If you are not, she can't."

The former conclusion may be good law, although the enforcement of which is sometimes attended with great practical difficulties.

As to the second relation our observation forces a contrary conclusion. It costs more and besides it don't require action by the courts to effect maintenance.—Ohio Law Bulletin.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Adjoining Landowners**—Lateral Support.—Adjoining landowner in making excavation held not liable for injuries in the absence of negligence where lateral pressure is increased by buildings.—Barnes v. City of Waterbury, Conn., 74 Atl. 902.

2. **Adverse Possession**—Color of Title.—Though a tax judgment was voidable, it was admissible in evidence in behalf of purchasers at a sale thereunder in support of the three-year statute of limitation.—Carr v. Miller, Tex., 123 S. W. 1158.

3.——Partition.—A partition is merely declamatory and not translative of ownership and cannot serve as a basis for prescription.—Pearce v. Ford, La., 50 So. 771.

4. **Animals**—Killing With Intent to Steal.—The offense denounced by Acts 1870, Ex. Sess., p. 50, No. 8, sec. 3, is the killing of an animal with intent to steal, and is distinct from the crime of larceny.—State v. Brown, La., 50 So. 813.

5. **Attorney and Client**—Bail or Surety.—Acts 1883, p. 18, No. 11, held not to prohibit an attorney from becoming surety on his client's bail bond.—State v. Babin, La., 50 So. 825.

6.——Effect of Suspension of Attorney.—A suspended attorney had no authority to move to set aside a judgment and open a default taken after his suspension, where his only interest in the case was his lien.—McDonald v. Kane, 120 N. Y. Supp. 283.

7. **Appeal and Error**—Proceedings for Land Registration.—Writ of error and not appeal is the proper proceeding for review in the Supreme Court of a judgment of the Supreme Court of the Philippine Islands, affirming a judgment of the court of land registration.—Tiglao v. Insular Government of Philippine Islands, U. S. S. C., 30 Sup. Ct. 129.

8. **Appearance**—Objection to Jurisdiction.—One whose rights are affected by a proceeding is not required to test the validity of orders in the proceedings by disobedience, but may appear specially and test the question of the validity of the proceedings with a view to having them dismissed, if invalid.—Warlick v. H. P. Reynolds & Co., N. C., 66 S. E. 657.

9. **Attorney and Client**—Authority.—An attorney at law, under his general authority, cannot make a valid acceptance of service of original process.—Warlick v. H. P. Reynolds & Co., N. C., 66 S. E. 657.

10. **Banks and Banking**—Notice to Director.—Notice to director of matter which it is to his interest to conceal held not notice to the bank.—First Nat. Bank v. Lowther-Kaufman Oil & Coal Co., W. Va., 66 S. E. 713.

11.——Payment on Forged Check.—That the year was not filled out on a forged check held not sufficient to put the bank on inquiry so as to make it liable for its payment.—Israel v. State Nat. Bank of New Orleans, La., 50 So. 783.

12. **Bills and Notes**—Consideration.—Even though one appeared to have signed a promissory note as an accommodation indorser, there was sufficient consideration for his indorsement if the note would not have been accepted without it.—Uvalde Asphalt Paving Co. v. National Trading Co., 120 N. Y. Supp. 11.

13.——Title.—Where a note is made payable to R., "executor of" a named estate, both the legal and equitable title thereto are prima facie in R. individually.—Kennedy v. Gelders, Ga., 66 S. E. 620.

14. **Brokers**—Commissions.—Where a real estate broker acted for the purchaser he could not, in the absence of a disclosure of that fact to the owner, look to the owner for commissions.—Summa v. Dereskiawicz, Conn., 74 Atl. 906.

15.——Discharge.—Where a broker, engaged to sell a stock of goods, effected a contract of sale between the owner and another, rescission of this contract by the parties held not a discharge of the broker.—Shelton v. Lundin, Ind., 90 N. E. 387.

16. **Carriers**—Ejecting Passengers.—In an action for ejection of a passenger on an excursion, evidence that defendant's conductor announced that no drinking would be allowed on the return trip held admissible.—Magill v. Seaboard Air Line Ry., S. C., 66 S. E. 561.

17.——Prima Facie Negligence.—If, in a suit against connecting carriers, delivery of stock in a sound condition to the initial carrier is shown, and it appears that they were injured when delivered to consignee, it establishes a prima facie case of negligence.—St. Louis & S. F. R. Co. v. Franklin, Tex., 123 S. W. 1150.

18. **Champerty and Maintenance**—Champertous Transactions.—A contract authorizing plaintiff to institute suit to recover land held not champertous, though a cost bond in the action was voluntarily executed by plaintiff's counsel.—Shelton v. Franklin, Mo., 123 S. W. 1084.

19. **Charities**—Negligence of Servant.—Where plaintiff, a steam fitter's helper, was injured by the negligence of defendant's servant while working on premises occupied by defendant, pursuant to a contract with plaintiff's employ-

er, defendant was liable under the doctrine of respondeat superior even if it was a charitable institution.—Gartland v. New York Zoological Society, 120 N. Y. Supp. 24.

20. **Constitutional Law**—Due Process of Law.—Rev. Laws, c. 12, secs. 4, 23, providing for the taxation of shares of capital stock of a resident of the state in a foreign corporation, is not violation of section 1 of the fourteenth amendment of the federal constitution.—Hawley v. City of Malden, Mass., 90 N. E. 415.

21.——Impairing Contract Obligations.—The obligation of a contract under which stockholders in a Kansas corporation acquired their stock held not impaired by Laws Kan. 1898 (Sp. Sess.) p. 32, c. 10, sec. 12, requiring that a statement of transfer of stock shall be filed with the Secretary of State by the officers of the corporation.—Henley v. Myers, U. S. S. C., 30 Sup. Ct. 1[illegible].

22. **Contracts**—Consideration.—A stockholders' independent promise to pay a debt of the corporation held enforceable only when based on an independent consideration.—Yracheta v. Stanford, 120 N. Y. Supp. 117.

23. **Corporations**—Service on Foreign Corporation.—A foreign corporation can be served with process within a state only when it is doing business therein, and such service must be made on an agent representing the company and its business.—Mechanical Appliance Co. v. Castleman, U. S. S. C., 30 Sup. Ct. 125.

24. **Counties**—Official Duties.—Where the law imposes on an officer the performance of acts as a part of his official duties, the commissioners' court of the county is without authority to contract with any other person to perform such services.—Stringer v. Franklin County, Tex., 123 S. W. 1168.

25.——Validity of Contracts.—The rule that a corporation receiving the benefit of an executed contract is estopped from pleading that the contract was ultra vires held not to apply to counties, towns, or cities where they exceed the legislative limit in contracting debts.—Burgin v. Smith, N. C., 66 S. E. 607.

26. **Courts**—Alias Summons.—After the last day on which service of the original summons may be had, the value of the original summons held only to prove that the alias was issued within the required time.—Godfrey v. Errett, 120 N. Y. Supp. 57.

27. **Criminal Law**—Confessions.—A confession may be in the form of a letter, or of several letters to different persons, or may consist of detached conversations with many people, or it may be a formal confession, or of all together.—People v. Giro, N. Y., 90 N. E. 432.

28.——Failure to Examine Witness.—Statement by prosecuting attorney in his argument that the reason he had not called a certain witness subpoenaed for the prosecution was because he was going to lie is not ground for reversal.—State v. Brady, La., 50 So. 806.

29. **Criminal Trial**—Appeal by Government.—The decision of federal court sustaining demurrer to indictment for introducing liquor into Indian country is reviewable by writ of error, where the question whether the indictment charges any offense against the United States involves the validity of Act January 30, 1897, c. 109, 29 Stat. 506.—United States v. Sutton, U. S. S. C., 30 Sup. Ct. 116.

30.——Misconduct of Jury.—Basing a conviction for perjury on the convictions of defendant on the prosecution on which he gave the alleged false testimony held misconduct of the jury, requiring reversal.—Warren v. State, Tex., 123 S. W. 1115.

31. **Deeds**—Description of Property.—A deed purporting to convey "324 acres of land, part of a certain tract" described by metes and bounds which contain 724 acres, without stating what part of the tract is sought to be conveyed, or any facts by which it can be identified, is void.—Cathey v. Buchanan Lumber Co., N C., 66 S. E. 580.

32. **Descent and Distribution**—Claims Against Distributee.—The right to retain from a distributee's share the amount of his indebtedness to the estate is not affected by the fact that the indebtedness is barred by limitations, so long as the indebtedness has not been discharged.—Ex parte Wilson, S. C., 66 S. E. 675.

33. **Domicile**—Establishment.—To establish a domicile of choice, there must be an abandonment of domicile of origin, selection of a new locus, and an intent of remaining.—Mather v. Cunningham, Me., 74 Atl. 809.

34. **Eminent Domain**—Property Subject to Compensation.—The special rights of owners of land extending to ordinary high-water mark of navigable waters in the waters opposite their holdings are rights of property which may not be taken without compensation and due process of law.—Broward v. Mabry, Fla., 50 So. 826.

35.——Value of Land Taken.—Where land sought to be condemned for public use is of greater value considered as a part of the entire property than as a separate piece, the compensation to be paid is the fair cash or market value considered in its relation to the remainder.—West Skokie Drainage Dist. v. Dawson, Ill., 90 N. E. 377.

36. **Equity**—Pleading.—Objection of multifariousness will not prevail on appeal where the bill charges a conspiracy between several trespassers, and trespasses extending over contiguous lands treated as one.—Graves v. Ashburn, U. S. S. C., 30 Sup. Ct. 108.

37. **Executors and Administrators**—Chinese Domicile.—A Chinese domicile gives a decedent's estate a fixed place of abode, and subjects it to the law governing the locality.—Mather v. Cunningham, Me., 74 Atl. 809.

38.——Creditor's Right to Sue.—A creditor of a decedent held entitled to sue the administrator, widow, and heirs for discovery of assets, and to subject land conveyed by the decedent in his lifetime, in consideration of love and affection.—Shurtleff v. Right, W. Va., 66 S. E. 719.

39.——Fraudulent Conveyances.—Judgment creditors of a deceased debtor have a right of action to annul any contract made by him in fraud of their rights.—Bank of Berwick v. George Vinson Shingle & Mfg. Co., Limited, La., 50 So. 823.

40. **Exemptions**—Property Subject.—That the judgment creditor had a privilege on property sought to be seized under execution, because the judgment was for necessary supplies, would not entitle the creditor to fees upon execution property of the debtor which was exempt therefrom.—Hinton v. Roane, La., 50 So. 798.

41. **False Imprisonment**—Sufficiency of Order for Arrest.—A direction given by a pastor during a disturbance in church for the arrest of a disturber held not to have authorized his arrest at a later time, so as to render the pastor liable for false imprisonment.—Stevens v. Gilbert, 120 N. Y. Supp. 114.

42. **Federal Court**—Following State Decisions.—Decision of the highest state court that grantor in a deed conveying coal under a tract of land with a right to mine the same cannot maintain action for damages on failure of the grantee to support the surface land, held not binding on the federal courts.—Kuhn v. Fairmont Coal Co., U. S. S. C., 30 Sup. Ct. 140.

43.——Service of Process.—Affidavits filed in connection with plea to jurisdiction should be considered by a federal Circuit Court in deciding the question raised by the plea setting up the objection that defendant was a foreign corporation and that the person served with process was not its agent at the time.—Mechanical Appliance Co. v. Castleman, U. S. S. C., 30 Sup. Ct. 125.

44. **Fixtures**—Sugar Mill.—A sugar mill erected on land held to pass with a deed to the land as a fixture.—Lanier v. Winchester, Ga., 66 S. E. 626.

45. **Fire Insurance**—Waiver of Forfeiture.—Parol waiver as to forfeiture clauses in insurance contracts may be shown notwithstanding an express provision of the policy forbidding it.—British America Assur. Co. v. Francisco, Tex., 123 S. W. 1144.

46. **Frauds, Statute of**—Executed Contract.—A tort-feasor when sued for an injury to land cannot object that a contract for sale of the land to plaintiff which had been executed was unenforceable in equity for noncompliance with the statute of frauds.—Virginia Ry. Co. v. Jeffries' Adm'r, Va., 66 S. E. 731.

47.——Part Performance.—Improvements indicating part performance of a land contract must be substantial and permanent, and the loss thereof a sacrifice, and must warrant a belief that they would not have been made, had there been no contract.—McKinley v. Hessen, 120 N. Y. Supp. 257.

48. **Fraudulent Conveyances**—Consideration.—A deed, in consideration of future support of a grantor, held void as against existing creditors.—Shurtleff v. Right, W. Va., 66 S. E. 719.

49.——Existing Obligations.—The liability of a principal to indemnify a surety on a bond is an existing liability when the bond is executed within the rule that a conveyance with intent to defraud creditors is void as to existing obligations.—Graeber v. Sides, N. C., 66 S. E. 600.

50.——Injunction.—The cutting, pendente lite, by the grantee in a fraudulent deed, of timber, valuable for timber and turpentine purposes, held not to defeat the jurisdiction of equity to cancel the deed.—Graves v. Ashburn, U. S. S. C., 30 Sup. Ct. 108.

51.——Mortgages.—A mortgage given to secure an actual loan may be fraudulent as to creditors, if made with intent to screen the property of the insolvent debtor from the creditors.—Bank of Berwick v. George Vinson Shingle & Mfg. Co., Limited, La., 50 So. 823.

52. **Homicide**—Assault With Intent to Murder.—To sustain a charge of assault with intent to murder, the evidence must show that, if death had ensued, it would have been murder.—Williams v. State, Tex., 123 S. W. 1110.

53.——Evidence.—Where defendant, in a prosecution for homicide, offers his clothes in evidence as part of his defense, the court is under no duty, at his request, to then order a chemical examination of the clothes for blood stains; there being no claim by the state that they did contain blood stains.—State v. Barker, Wash., 106 Pac. 133.

54.——Instructions.—An instruction that, if the jury were "left in doubt" as to whether accused slew in self-defense, they should convict of manslaughter, was erroneous.—State v. Fowler, N. C., 66 S. E. 567.

55.——Verdict.—That the jury found the accused guilty of murder "without capital punishment" was not evidence of such uncertainty in the minds of the jury as to justify a reversal.—State v. Brady, La., 50 So. 806.

56. **Indictment and Information**—Bill of Particulars.—In a prosecution for maintaining a tippling shop, defendant held entitled to a bill of particulars alleging the name of the particular drink sold by him claimed by the state to be intoxicating.—State v. Clark, La., 50 So. 811.

57. **Intoxicating Liquors**—Formula.—A beverage under a particular trade-name and manufactured by a particular firm would be presumed to be manufactured from a formula, and to be of a uniform quality.—State v. Clark, La., 50 So 811.

58.——"Near Beer."—Since the General Assembly, by the "near-beer" tax act, has expressed the general policy of permitting its sale, the counties may not prohibit it, and municipalities may only regulate, but not forbid, its sale.—Parker v. Griffith, N. C., 66 S. E. 565.

59. **Joint Adventures**—Fraud.—Where the officers and managers of a syndicate, wishing to unite the interests of separate corporations, organized a holding corporation and issued a prospectus in relation thereto, the officers and managers who adopted and recognized the prospectus are liable for any fraud or misrepresentation contained therein, though innocent of any personal wrongdoing.—Lane v. Fenn, 120 N. Y. Supp. 237.

60. **Judicial Sales**—Policy of the Law.—The policy of the law is to remove before sale all defects of title to property sold under judicial process, so as to have the property sold bring the highest price and eliminate, as far as possible, speculation in defective titles to such property. —Crockett v. Bray, N. C., 66 S. E. 666.

61. **Landlord and Tenant**—Creation of Relation.—A contract granting room on a dock held to create the relation of landlord and tenant.—Brooklyn Dock & Terminal Co. v. Bahrenburg, 120 N. Y. Supp. 205.

62.——Creation of Relation.—A contract for the right to place signs on the buildings of another does not create the relation of landlord and tenant.—May v. Breunig, 120 N. Y. Supp. 98.

63.——Effect of Foreclosure of Mortgage.—A tenant, who was not a party to a foreclosure, is not bound by the proceedings; and, not having attorned to a receiver appointed therein, he cannot be devested of his possession by summary proceedings by such receiver.—McDonald v. Cohen, 120 N. Y. Supp. 94.

64. **Libel and Slander**—Report of Judicial Proceedings.—A report of a judicial proceeding held not as a matter of law a fair report, but the question of malice resulting from failure to include in the report certain matter is for the jury.—Meriwether v. Publishers: Geo. Knapp & Co., Mo., 123 S. W. 1100.

65. **Logs and Logging**—Delivery.—In an action for the price of logs furnished under a contract to deliver at I. about 500 oak and poplar logs, plaintiff could not recover unless he delivered at or near I. the logs specified in the contract.—Eversole v. Wilson, Ky., 123 S. W. 1196.

66. **Malicious Prosecution**—Statement to Prosecuting Officer.—In an action for malicious prosecution, where defendant, after statement of the case, made his affidavit under instruction of the prosecuting attorney, there can be no recovery.—Hammar v. J. B. & J. W. Atkins, La., 50 So. 787.

67. **Mandamus**—Demand.—A demand held not necessary before mandamus to compel county commissioners to levy a tax to satisfy judgments on county bonds.—Board of Com'rs of Santa Fe County v. Territory of New Mexico, U. S. S. C., 30 Sup. Ct. 111.

68. **Master and Servant**—Action for Wages.—In an action by a servant for compensation, evidence of earnings by plaintiff, after his discharge during the time for which he was claiming wages from the defendant, was properly excluded, in the absence of a special plea of such earnings.—Phillips Lumber Co. v. Smith, Ga., 66 S. E. 623.

69.——Contributory Negligence.—A lineman employed by a telephone company to remove poles held entitled to assume that the company had inspected the poles beneath the surface of the ground.—La Duke v. Hudson River Telephone Co., 120 N. Y. Supp. 171.

70.——Injuries to Servant.—A mine boss and fire boss employed in a coal mine, under Code 1906, secs. 409, 410, are fellow servants of miners employed therein.—Bradley v. Tidewater Coal & Coke Co., W. Va., 66 S. E. 684.

71.——Injuries to Servant.—Conductor of freight train held not negligent in giving signal for train to move forward before seeing that a brakeman had gone aboard.—Van Haaren v. Long Island R. Co., 120 N. Y. Supp. 157.

72.——Injuries to Servant.—A company with the power of eminent domain, and authorized to construct railways, etc., for the transportation of passengers and freight, including logs, etc., though its chief purpose was to exploit certain timber land, held a "railroad," and subject to the fellow servant act, and hence responsible for actionable negligence in the operation of the road under a lease and in the exercise of the franchise.—Wright v. Caney River Ry. Co., N. C., 66 S. E. 588.

73.——Risks Assumed.—A fireman who knows that the engine is running backward over a new and rough track does not assume the risk of injury therefrom unless the danger is known or apparent to him.—Missouri, K. & T. Ry. Co. of Texas v. Poole, Tex., 123 S W. 1176.

74. **Mechanics' Liens**—Waiver.—The right to a mechanic's lien is not waived by extension of credit, unless the time is extended beyond that within which an action may be commenced to enforce the lien.—Landsberg & Co. v. Hein Const. Co., 120 N. Y. Supp. 190.

75. **Mines and Minerals**—Deed of Mining Rights.—A deed of mining rights releasing injury to surface land held binding on subsequent grantees of the surface lands.—Kellert v. Rochester P. Coal & Iron Co., Pa., 74 Atl. 789.

76.——Regulation of Mineral Waters.—The state may not, under the plea of protecting its natural resources, arbitrarily arrest the work

of an owner of land, beneath the surface of which percolate mineral waters, in extracting from the waters gases for commercial purposes. —People v. New York Carbonic Acid Gas Co., N. Y., 93 N. E. 441.

77. **Mortgages**—Improvements.—The value of permanent improvements by a mortgagee in possession, who supposes himself to have acquired absolute title, will be allowed upon subsequent redemption.—Liskey v. Snyder, W. Va., 66 S. E. 702.

78. **Municipal Corporations**—Defective Street. —Where a water meter box upon a sidewalk is kept alternately in a safe and a dangerous condition for such a time that, if its condition was always dangerous, notice of the defect would be presumed, one injured thereby need not show notice or knowledge on the part of the city upon each recurrence of the danger.—City of Rome v. Brooks, Ga., 66 S. E. 627.

79.——Negligence of Servants.—The New York Zoological Society held not a governmental agency, so far as to exempt it from liability for injuries to third persons by the negligence of its employees in maintaining its property.—Gartland v. New York Zoological Society, 120 N. Y. Supp. 24.

80.——Ownership and Operation of Farm.—A municipality held entitled to own and control a farm and the buildings thereon, disconnected from any public use, and for its own benefit.—Libby v. City of Portland, Me., 74 Atl. 805.

81.——Sewers.—The filling up of plaintiff's flats on a navigable river by a sewer held a private wrong, so that plaintiff need not show special damages caused by the public wrong in filling up the river in order to recover against the city.—Whitten v. City of Haverhill, Mass., 90 N. E. 409.

82. **Navigable Waters** — Improvement of Stream.—United States is not estopped to rely on the five years' limitation prescribed by Act March 3, 1891, c. 561, for constructing an irrigation ditch by obtaining an injunction interfering with such construction.—Rio Grande Dam & Irrigation Co. v. United States, U. S. S. C., 30 Sup. Ct. 97.

83. **Negligence**—Pleading.—In an action for negligence, where plaintiff contends that under a statute he should be allowed to recover notwithstanding his own negligence, he cannot invoke the statute where the petition did not predicate on it.—Stegmann v. Gerber, Mo., 123 S. W. 1041.

84. **Nuisance**—Damages.—If a nuisance is maintained, a person suing for damages therefrom must have done what he could to save himself from the consequences of the wrong, and all damages which result from the failure to discharge that duty must be borne by him, but such damages cannot defeat his right to sue.—Carroll Springs Distilling Co. of Baltimore City v. Schnepfe, Md., 74 Atl. 828.

85. **Officers**—Possession of Office.—While equity cannot determine the question of title to office, it will enjoin interference with discharge of duties of an incumbent, duly elected, and claiming under color of right.—Hardy v. Reamer, S. C., 66 S. E. 678.

86. **Partnership**—Accounting.—The death of a partner in a firm which was not actively engaged in business held not to so effectually dissolve it that one of the partners could not compel an accounting for profits for the time between the death and the expiration of the firm as originally agreed.—Beller v. Murphy, Mo., 123 S. W. 1029.

87.——Existence.—In an action by a third person against alleged partners by holding out, the conduct and admissions of an alleged partner is admissible to prove that the act of holding out was done either by him or with his consent. Ex parte Wilson, S. C., 66 S. E. 675.

88.——Torts of Partner.—Where one member of a corporation converts personal property of a third party to the use of the firm, the owner has a right of action at his option against the partnership or against the individual member guilty of the conversion to recover the property converted or its value.—Thompson v. Harris, Ga., 66 S. E. 629.

89. **Powers**—Rights of Creditors.—Property incumbered by a general power of appointment is subject to the debts of the donee of the power when the property passes by virtue of the execution of the power.—Arnold v. Southern Pine Lumber Co., Tex., 123 S. W. 1162.

90.——Rights of Life Tenant.—A widow authorized to sell her husband's land when necessary for her comfort and support, held entitled to make sales in her reasonable discretion.—Griffin v. Nicholas, Mo., 123 S. W. 1063.

91. **Process**—Foreign Witness.—A non-resident witness coming into the jurisdiction to testify in a case to which he is not a party is not deprived of immunity from service of civil process because he has some interest in the suit.—Chittenden v. Carter, Conn., 74 Atl. 884.

92. **Prohibition** — Jurisdiction of Supreme Court.—A writ of prohibition is to restrain judicial, and not legislative, executive, or administrative, action.—State ex rel. McEntee v. Bright, Mo., 123 S. W. 1057.

93. **Public Lands** — Philippine Islands.—A grant of public land in the Philippines by subordinate Spanish officials receives no support from the decree of the Spanish courts of January 4, 1813, where conditions in such decree were not fulfilled.—Tiglao v. Insular Government of Philippine Islands, U. S. S. C., 30 Sup. Ct. 129.

94.——Railroad Land Grants.—The grant to the Union Pacific Railroad Company by act July 3, 1866, c. 159, 14 Stat. 79, of a right-of-way through the public lands held not to give it the right to run the road through lands in the actual occupation of a homesteader.—Union Pac. R. C. v. Harris, U. S. S. C., 30 Sup. Ct. 138.

95. **Quieting Title**—Cloud on Title.—No cloud is cast upon plaintiff's title so as to enable him to sue in equity to remove it where a fatal defect appears on the face of the record through which defendant claims; the legal remedy being adequate.—Turner v. Hunter, Mo., 123 S. W. 1097.

96. **Railroads**—Crossing Accidents.—It is a flagman's duty to warn a traveler approaching a crossing in season, to enable him to stop his team at a point where an ordinarily well-broken horse would not be dangerously frightened.—Huntington v. Bangor & A. R. Co., Me., 74 Atl. 802.

97.——Injury to Persons on Track.—In an action for the death of a person struck on a railroad track, a charge that he was at the time guilty of the "grossest" negligence in sitting on the track held not prejudicial.—Sherman v. Chicago, R. I. & P. Ry. Co., Ark., 123 S. W. 1182.

98. **Reformation of Instruments**—Parties.—A vendor's equity for the correction of an error in the description of the land is available as a defense to the purchaser's suit for possession, if properly pleaded.—Moore v. Moore, N. C., 66 S. E. 598.

99. **Release**—Damages from Working Mine.—Where removal of coal causes subsidence of surface, owners of coal held not liable to the owners of the surface, where their grantors had released all claims for damages for such injury. —Kellert v. Rochester & P. Coal & Iron Co., Pa., 74 Atl. 789.

100. **Religious Societies**—Injunction.—Where a majority of the trustees of the church refused to permit the duly appointed minister to hold the services in the church property or reside in the parsonage, the chancery court by final decree had jurisdiction to grant complete relief.—Tebo v. Hazel, Del., 74 Atl. 841.

101. **Removal of Causes**—Effect of Service.—Return of a state sheriff is not conclusive as to the validity of service of process on a corporation, where the case had been removed to a federal court by defendant who raises by plea to the jurisdiction in that the person served with process was not its agent at the time.—Mechanical Appliance Co. v. Castleman, U. S. S. C., 30 Sup. Ct. 125.

102. **Sales**—Action for Price.—If, after a contract of sale of a car load of lumber was rescinded, the buyer went into the car and took a part of it, it would be a conversion, and the seller could recover only the value of the lumber actually taken, with such damages to the

car load lot as he sustained.—Teeter v. Cole Mfg. Co., N. C., 66 S. E. 582.

103.——Breach of Contract.—Where a contract for the sale of personal property fixes no special date for delivery, a breach of the contract exists when the seller notifies the buyer that he will not comply with the contract, and he has notice of the extent of the breach.—Howard v. Haas, Mo., 123 S. W. 1048.

104.——Implied Warranties.—The implied warranties arising on the sale of goods to be manufactured by the seller does not survive acceptance where a defect in the goods is discoverable on customary and ordinary inspection.—Kelly Asphalt Block Co. v. Barber Asphalt Paving Co., 123 N. Y. Supp. 163.

105. **Seduction**—What Constitutes.—Where a single woman allows an unmarried man to have sexual intercourse with her, relying solely on his promise to marry her in case she becomes pregnant, it is not seduction, but a bargain.—Woodall v. State, Ga., 66 S. E. 619.

106. **Specific Performance**—Contracts Enforceable.—Equity will compel a wife to specifically perform her oral agreement to reconvey land to her husband to prevent the abuse of confidence and perpetration of a fraud.—Gallagher v. Gallagher, 120 N. Y. Supp. 18.

107.——Contracts Enforceable.—Specific performance would not be decreed of a contract by a widow, to whom her husband left his whole estate for life, with power to sell for her support, to convey a portion of the property to defendants in consideration of care and support.—Griffin v. Nicholas, Mo., 123 S. W. 1063.

108. **States**—Territorial Jurisdiction.—Where the state of New York has jurisdiction of the waters of the North River for purposes of commerce and navigation, it has power to create a cause of action in favor of the next of kin of one negligently killed by vessels navigating in such waters.—Carlin v. New York Dock Co., 120 N. Y. Supp. 261.

109. **Street Railroads**—Care Required.—Where a street railroad might, by the exercise of ordinary care, have avoided injury to a traveler guilty of negligence in driving on the track, it will be liable for the failure to exercise such care.—Carroll v. Connecticut Co., Conn., 74 Atl. 897.

110.——Injury to Passenger.—A carrier held not liable for injuries to a passenger by falling over parcels left in the doorway of the car by another passenger.—Lyons v. Boston Elevated Ry. Co., Mass., 90 N. E. 419.

111.——Injuries to Traveler.—A street railway company may not, with knowledge, negligently run down a valuable animal or man on the track, however negligently or unlawfully they may be there.—Swift & Co. v. New York & Q. C. Ry. Co., 120 N. Y. Supp. 203.

112.——Ordinances.—Acceptance of a municipal ordinance requiring street railway companies to issue transfers held not to abrogate existing contract right secured against impairment by subsequent legislation to charge five cent rate for passage not exceeding three miles in length.—City of Minneapolis v Minneapolis St. Ry. Co., U. S. S. C., 30 Sup. Ct. 118.

113. **Taxation**—Redemption.—Acquiring of a tax title by one of two parties owning interests in the same land held a redemption thereof.—Callihan v. Russell, W. Va., 66 S. E. 695.

114.——Tax Deed.—That the sheriff's acknowledgment to a deed under a tax judgment was taken by the grantee did not render the deed inadmissible in evidence, a subsequent acknowledgment before a different officer being shown.—Carr v. Miller, Tex., 123 S. W. 1158.

115.——Tax Deed.—That a tax deed was on record so as to give notice to a subsequent purchaser that the land was sold in bulk and not subdivided as required by statute would not give him notice of any resulting damage to the owner so as to authorize a suit to cancel the deed on the ground of such irregularity in the sale.—Shelton v. Franklin, Mo., 123 S. W. 1084.

116.——Tax Title.—Failure of assessors to verify the tax roll makes the tax and the subsequent sale of the land for its non-payment void.—People v. Inman, N. Y., 90 N. E. 438.

117. **Telegraphs and Telephones**—Damages for Mental Suffering.—The addressee of a message announcing the illness of his child held entitled to recover for mental anguish caused by negligent delay in delivery.—Battle v. Western Union Telegraph Co., N. C., 66 S. E. 661.

118. **Trusts**—Construction.—A deed to one in trust to hold for the use of his wife for life, with power of appointment, held to have devested the grantors of the entire fee.—Arnold v. Southern Pine Lumber Co., Tex., 123 S. W. 1162.

119.——Resulting Use.—Where a deed to a husband in trust for his wife for life, and for her children after her death, is in the nature of a family settlement, no resulting use in favor of the husband and wife by reason of the consideration having been paid by them in money will be presumed.—Arnold v. Southern Pine Lumber Co., Tex., 123 S. W. 1162.

120. **Vendor and Purchaser**—Bona Fide Purchaser.—A recorded judgment against land for taxes and the subsequent tax sale would put a subsequent purchaser of the land on inquiry so as to charge him with knowledge of the sale.—Griffin v. Franklin, Mo., 123 S. W. 1092.

121.——Pre-Existing Debts.—A conveyance taken in payment of a former indebtedness does not give to the grantee the legal status of a bona fide purchaser so as to give the grantee preference over a prior unrecorded deed.—Temple v. Osburn, Or., 106 Pac. 16.

122.——Purchase from Bona Fide Purchaser.—A purchaser for value from one whose deed was obtained by fraud of which he had no notice takes good title, and one purchasing from an innocent purchaser without notice would take good title even if he had notice of the fraud.—Phillips v. Buchanan Lumber Co., N. C., 66 S. E. 603.

123.——Unrecorded Deed.—Undelivered deed from husband and wife to trustee for wife not recorded until after judgment against the husband held invalid as against purchasers at execution sale against him.—Bauer v. Martin, Pa., 74 Atl. 740.

124. **Waters and Water Courses**—Irrigation Districts.—In proceedings by owner of land to have it detached from irrigation district, he must show that from some natural cause it is non-irrigable or expressly exempt by statute.—Sowerwine v. Central Irr. Dist., Neb., 124 N. W. 118.

125.——Regulation of Water Rates.—A waterworks company must disclose the full value of the property and all its earnings and expenses when it assails as confiscatory rates fixed by ordinance.—McCook Waterworks Co. v. City of McCook, Neb., 124 N. W. 100.

126.——Subterranean Waters.—The right to appropriate springs and subterranean waters held an incident of the ownership of land.—People v. New York Carbonic Acid Gas Co., N. Y., 90 N. E. 441.

127. **Wills**—Construction.—The word "ancestor," as used in a devise of a remainder, held to exclude from the heirs and representatives of a deceased remainderman the husbands or wives of remaindermen who died prior to the life tenant.—In re Nelson's Estate, Del., 74 Atl. 851.

128.——Mutual Agreements to Will.—A contract between two to will their property in specified ways, or to specified persons, held enforceable.—Dresumeur v. Rondel, N. J., 74 Atl. 703.

129.——Rights of Widow.—As the law gives the widow absolutely a certain part of her husband's estate at his death, he cannot deprive her of it by will, and, in the absence of a provision requiring her to renounce the provisions in his will, she need not do so, but may ignore it and claim what the law entitles her to.—Egger v. Egger, Mo., 123 S. W. 928.

130. **Witnesses**—Competency.—The surviving party to a contract can be compelled to testify against himself as to the terms thereof, in an action thereon by the representative of the other party.—Jackson v. Smith, Mo., 123 S. W. 1026.